UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CURRIER BUILDERS, INC., et al.,	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Docket No. 01-68-P-C***
	)	
TOWN OF YORK,	***)***	
	)	
Defendant	***)***	

MEMORANDUM DECISION ON DEFENDANT'S MOTION TO STRIKE AND RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION OF PLAINTIFFS HOME BUILDERS ASSOCIATION AND WALTER WOODS FOR PARTIAL SUMMARY JUDGMENT

The defendant town moves for summary judgment on all remaining counts[1] asserted by the four plaintiffs. I recommend that the court grant this motion in part. Plaintiffs Home Builders Association, Inc. ("Home Builders") and Walter Woods move for summary judgment on Count IV of the amended complaint. I recommend that the court deny this motion.

I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a

[1] Counts II and V have been dismissed. Order Affirming the Recommended Decision of the Magistrate Judge. Docket No. 19.

reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr*., 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

The mere fact that both sides seek summary judgment on a particular claim does not render summary judgment inappropriate. 10A Charles Wright, Arthur Miller & Mary Kane, *Federal Practice and Procedure* ("Wright, Miller & Kane") § 2720 at 327-28 (3d ed. 1998). For those issues subject to cross-motions for summary judgment, the court must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to judgment as a matter of law. 10A Wright, Miller & Kane § 2720.

II. Factual Background

The following undisputed facts are material and appropriately supported in the parties' respective statements of material facts submitted pursuant to this court's Local Rule 56.

The defendant Town, which has a population of approximately 13,000, experienced its largest population growth in the 1990s. Defendant's Statement of Material Facts as to Which There is No Genuine Issue to be Tried ("Defendant's SMF") (Docket No. 37) ¶ 1; Plaintiffs' Response to Defendant's Statement of Undisputed Material Facts, etc. ("Plaintiffs' Responsive SMF") (Docket No. 40) ¶ 1. The Town has issued the following numbers of residential building permits in the years shown: 1980 — 142; 1982 — 105; 1983 — 122; 1984 — 210; 1985 — 324; 1986 — 422; 1987 — 95; 1988 — 66; 1989 — 89; 1990 — 65; 1991 — 65; 1992 — 86; 1993 — 77; 1994 — 92; 1995 — 85; 1996 — 110; 1997 — 117; 1998 — 145; 1999 — 160. *Id*.

Under the Town Charter, an ordinance may be proposed by petition and adopted by general referendum after a public hearing. *Id*. ¶ 2. On August 26, 2000 a Residential Growth Ordinance was so adopted by the Town. *Id*. The Ordinance states that it is retroactive to May 22, 2000. *Id*. The Town required applicants for building permits to sign an addendum to their applications providing that any permit issued after May 22, 2000 might be revoked. *Id*.

Applicants seeking approval for subdivision development projects in York must first obtain approval from the planning board of a sketch plan, a preliminary plan and a final plan. *Id*. ¶ 4. They may then apply for residential building permits. *Id*. The Ordinance provides that no more than seven dwelling units will be authorized per month and that applications shall be filed with the code enforcement officer and dated the month in which they are filed. *Id*. Applications for not more than two dwelling units shall be allowed for any one subdivision per month. *Id*. No person shall submit

more than one application per month for residential building permits for lots not within a subdivision. *Id*.

Residential building permit applications within each category are placed in a box for the month they were submitted and are drawn, in accordance with the procedure described herein, until the box is empty. *Id*. ¶ 5. Only then may the code enforcement officer start drawing from the box for the subsequent month. *Id*. The code enforcement officer first draws applications for up to four dwelling units from the non-subdivision box. *Id*. If there are applications for fewer than four dwelling units in the non-subdivision box, he then draws applications for up to a total of four dwelling units from the subdivision box. *Id*. If there are more than four applications in the non-subdivision box, the code enforcement officer draws three from the subdivision box. *Id*. If there are more applications in a box than the total allowed, the drawing shall be a blind lottery and the undrawn applications assigned to a subsequent month until the box is depleted. *Id*. Regardless of the number of applications for building permits submitted in a given month, all of the applications are actually drawn on one specified day and all of the applicants are given a date on which they will be issued a building permit. *Id*. ¶ 6.

A subdivision with three to six potential units is allowed to have one permit application pending at any time. *Id*. ¶ 7. A subdivision with seven to ten units is allowed to have two pending applications and a subdivision with eleven or more units is allowed three. *Id*. The Ordinance exempts from its requirements only elderly housing proposed by the York Housing Authority. *Id*. ¶ 8. The Ordinance states that it will terminate automatically three years from the date of enactment, unless specifically extended by a vote at a general or special referendum election. *Id*. ¶ 9.

Plaintiff Currier Builders, Inc. ("Currier") is a Maine corporation which has been in the business of residential construction and remodeling since 1989. *Id*. ¶ 13. As of January 30, 2002 Currier was building homes in Acton, Wells and Cape Neddick, Maine. *Id*. ¶ 15. Currier has owned

no land in York since 1989. *Id*. ¶ 14.[2] Currier is not a member of plaintiff Home Builders. *Id*. ¶ 16. Since the Ordinance was adopted, Currier has applied for a building permit in the Town for a parcel on Clay Hill Road in Cape Neddick. *Id*. ¶ 18. The permit was not subject to the Ordinance and was granted in two days. *Id*. As of January 30, 2002 Currier had not lost any money as a result of the Ordinance. *Id*. ¶ 21.

Plaintiff Cape Neddick Estates, Inc. ("Estates") is a Maine corporation formed to develop a subdivision on Walter Kuhn Road in York. *Id*. ¶ 24. It owns thirty-one acres of property in York. *Id.* It received final subdivision approval from the York planning board for an eight-lot subdivision on January 14, 2001. *Id*. ¶ 25. As of January 30, 2002 Estates had one building permit in hand that had been received in July 2001 and expected to receive a second permit in March 2002. *Id.* ¶ 26. It had already sold one lot in the subdivision and the purchaser of that lot has applied for a building permit. *Id*. Under the Ordinance, only two applications for building permits in this subdivision may be pending at any one time. *Id*. ¶ 27. The principal of Estates plans to apply for another permit after it receives its building permit in March 2002. *Id*. ¶¶ 24, 27. Estates is not a member of Home Builders. *Id*. ¶ 34. It does not own any other land in York on which it intends to build residences. *Id*.

Plaintiff Walter Woods is a resident of York and the president of Graystone Builders, Inc. *Id.* ¶ 35. Woods purchased land on Ridge Road in 1994 and 1995. *Id*. In 1996 Woods applied to the York planning board to develop and construct a 32-unit duplex style complex for elderly congregate care known as Spring Pond Estates (Phase I). *Id*. ¶ 36. He received planning board approval in April 1997 and began construction in September 1998. *Id*. Prior to enactment of the Ordinance, Woods had

[2] In their response to this paragraph of the defendant's statement of material facts, the plaintiffs assert that the president of Currier "has held a financial interest in a number of parcels in York after 1989," that he "typically" purchased parcels (presumably in York) and "then placed [them] in the name of an immediate family member," and that Currier "was therefore the beneficial owner of these parcels." Plaintiffs' Responsive SMF ¶ 14. On the factual showing made, the last assertion, a legal conclusion, is unsupported and must be disregarded.

begun planning to construct Phase II on the same parcel. *Id*. ¶ 37. To be known as Brookside Villas, Phase II consisted of a 75 to 100 unit congregate care complex, including studio, one-bedroom and two-bedroom apartments and 16 duplex-style elderly housing units. *Id*. Woods also planned to construct a separate 18-unit rental apartment complex designed to cater to lower income residents of any age on this parcel. *Id*. Prior to the enactment of the Ordinance, Woods had not applied for any building permits in connection with Phase II. *Id*. ¶ 39. After the Ordinance was adopted, Woods circulated a petition for a referendum vote to amend the Ordinance to exempt elderly housing or elderly congregate care housing. *Id*. ¶ 40. The proposed amendment went to referendum in November 2001 and failed. *Id*. Woods thereafter decided to join this already-pending action as a plaintiff. *Id.* ¶ 41.

Elderly congregate care projects require that all components of the project be constructed to render the project attractive to elderly clients and the entire project is necessary in order for Woods to recoup his investment. Plaintiffs' Additional Statement of Undisputed Material Facts ("Plaintiffs' SMF") (included in Plaintiffs' Responsive SMF at 17-30) ¶ 130; Defendant Town of York's Response to Plaintiffs' Statement of Additional Undisputed Material Facts ("Defendant's Reply SMF") (Docket No. 49) ¶ 130. Residents of Phase I purchased their units in reliance on the fact that Phase II would be approved and constructed. *Id*. Phase I offered independent living for seniors. *Id*. Phase II was designed with assisted living and nursing home components so that these residents could remain in the same retirement community should they require an increased amount of care or should their financial condition change for the worse. *Id*. This concept, known as the "continuum level of care" for seniors, is an integral element of successful retirement communities. *Id*. The defendant's expert witness conceded that Woods would have to wait many years to gain the necessary permits for Phase II, rendering it economically infeasible. *Id*. ¶ 134.

As of January 21, 2002 Woods has not submitted Phase II to the York planning board for approval. Defendant's SMF ¶ 43; Plaintiffs' Responsive SMF ¶ 43. It would take between six and nine months for the project to be approved. *Id*. Woods would not be able to apply for a building permit on Phase II until he had obtained planning board approval. *Id*. Woods estimates that he has between seven and eight acres of developable land at the site. *Id*. ¶ 46. Woods owns other land in York and intends to acquire three parcels on which building permits have been issued. *Id*. ¶ 49.

On May 22, 1999 the York board of selectmen adopted the York Comprehensive Plan. *Id*. ¶ 50. On May 29, 2001 the board of selectmen adopted amendments to the Comprehensive Plan pertaining to the Ordinance. *Id*. Before the citizen-initiated petition that resulted in the Ordinance, the selectmen were already committed to developing some kind of proposal for a growth cap. *Id*. ¶ 59. After the petition was submitted, the selectmen appointed a committee to draft a growth cap ordinance. *Id*. The committee's draft allowed for the annual issuance of 120 building permits. *Id*. Since the Ordinance was enacted, no applications for building permits for multi-family units have been submitted to the Town. *Id*. ¶ 61.

The Town has applied the Ordinance in a manner consistent with its expressed terms and requirements. *Id*. ¶ 68. The wait for a building permit in the non-subdivision category is nearly two years. Plaintiffs' SMF ¶ 112; Defendant's Reply SMF ¶ 112. Multi-family units must have building permits for all of the project's units before construction may begin. *Id*. ¶ 117. As of early 2002 the wait for a single building permit within a multi-family dwelling was between six months and one year. *Id*. ¶ 118.

The designated representative of Home Builders who testified at deposition was unable to identify any member of the association that had suffered adverse economic impact as a result of the Ordinance. Defendant's SMF ¶ 97; Plaintiffs' Responsive SMF ¶ 97.

III. Discussion

A. Motion To Strike

The defendant has moved to strike a document filed by the Woods and Home Builders entitled "Plaintiffs' Reply & Supplemental Statements of Undisputed Material Facts" ("Woods' Supplemental SMF"), Docket No. 46, on the grounds that it violates this court's Local Rule 56. Defendant's Motion to Strike Plaintiffs' "Reply & Supplemental Statements of Undisputed Material Facts" (Docket No. 52). The "supplemental" statement of material facts purports to "controvert"[3] each of the defendant's denials or qualifications of paragraphs included in these plaintiffs' initial statement of material facts. It also includes two new paragraphs separately entitled "Plaintiffs' Supplemental Statement of Undisputed Material Facts." Woods' Supplemental SMF at 7. Neither type of submission is contemplated by Local Rule 56 and numerous decisions of this court have held that new factual assertions submitted with a reply to the opposition to a motion for summary judgment in the absence of a request for leave to do so will be disregarded by the court. The Woods plaintiffs' two additional factual paragraphs included in Docket No. 46 will fare no differently. The motion to strike is granted as to those paragraphs.

The Woods plaintiffs' opposition to the motion to strike characterizes their "controverting" or qualifying of 25 of the defendant's responses to the 40 paragraphs included in their initial statement of material facts as the reply contemplated by Local Rule 56(d) to additional facts raised in those responses. Of course, Local Rule 56(d) refers to additional facts raised by the party opposing a motion for summary judgment in a separate section or document, after admitting, denying or qualifying the factual statements in a moving party's statement of material facts, not to the required citation in those responses of places in the record where qualifying or opposing information is to be found. If an

[3] Local Rule 56 specifically requires a party to admit, deny or qualify each paragraph of an opposing party's statement of material (*continued on next page*)

opposing party failed to comply with Local Rule 56 and in fact included additional facts not necessary to deny assertions in a moving party's statement of material facts in its response to such paragraphs rather than separately after completing its response, the plaintiffs' argument might have merit. However, in this case none of the defendant's denials may be fairly so characterized.

The defendant's qualifications in responding to paragraphs 13, 21 and 25 of the plaintiffs' initial statement of material facts may be characterized as adding new facts to which the plaintiffs should be allowed to respond. For this reason the motion to strike will be denied as to the reply statement, as distinguished from the supplemental statements included in the document. However, for the reasons stated above, I will not consider the plaintiffs' reply statement in connection with any other paragraphs of the defendant's responsive statement of material facts.

The plaintiffs also request that "[s]hould this Court determine . . . that Plaintiffs' submission was improper, . . . this Court treat the parties equally and likewise strike any additional, previously-uncited facts from the Record in Defendant's Reply and Response SOMF, including but not limited to all facts from the Affidavit of Stephen Burns." Plaintiffs' Opposition to Defendant's Motion to Strike, etc. (Docket No. 53) at 2. If the plaintiffs believe that the defendant's submission of the Affidavit of Stephen F. Burns (Docket No. 48) in support of its reply to the statement of additional facts that they submitted with their response to the defendant's initial statement of material facts violated Local Rule 56, the appropriate step for them to take would be the filing of a motion to strike that document. A limited, "tit for tat" request that the document be struck only if all or any portion of the plaintiffs' reply filing is struck in response to a properly filed motion to strike is not an appropriate approach to the issue. In any event, the only reference to the Burns affidavit in the defendant's response to the plaintiffs' statement of additional facts is found at paragraph 129. Defendant's Reply SMF ¶ 129.

facts. The use of terms such as "uncontroverted" or "not denied" does not comply with the rule and is not helpful to the court.

This use of an additional affidavit was necessary to provide evidentiary support for the defendant's denial of the plaintiffs' factual assertion and is well within the scope of Local Rule 56. The defendant did not attempt to use the affidavit to add to the summary judgment record more positive factual assertions in support of its overall position in connection with its reply to the plaintiffs' opposition to its motion, which would not have been acceptable under the local rule. That distinction is clear, and it is critical.

B. The Motion for Partial Summary Judgment

Woods and Home Builders (hereafter "Woods") contend, Plaintiffs Walter Woods' and Homebuilders & Remodelers Association of Maine's Motion for Partial Summary Judgment, etc. ("Woods Motion") (Docket No. 32), that they are entitled to summary judgment on Count IV of the amended complaint, which attacks the Ordinance "[b]oth on its face and as applied" on the ground that it deprives them of property without compensation in violation of the state and federal constitutions. Amended Complaint ¶¶ 102-06. The defendant also seeks summary judgment on this count. Defendant's Motion for Summary Judgment, etc. ("Defendant's Motion") (Docket No. 34) at 14-19.[4]

> The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, prohibits the government from taking private property for public use without just compensation. The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use. Our cases establish that even a minimal permanent physical occupation of real property requires compensation under the Clause. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. In Justice Holmes' well-known, if less than self-defining, formulation, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." *Id*., at 415.

[4] The parties do not contend that the requirements of the Maine and federal constitutions differ with respect to this or any claim raised in this action. The following discussion mentions only the federal constitution but is equally applicable to the claims brought under the Maine constitution.

> Since *Mahon*, we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking. First, we have observed, with certain qualifications, . . . that a regulation which denies all economically beneficial or productive use of land will require compensation under the Takings Clause. Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. These inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Palazzolo v. Rhode Island, 533 U.S. 606, 617-18 (2001) (citations and internal quotation marks omitted). "Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest. . . . A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle.'" *Id*. at 631. "[R]egulations that leave the owner of land without economically beneficial or productive options for its use — typically . . . by requiring land to be left substantially in its natural state — carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992). A landowner who "has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, . . . has suffered a taking." *Id*. at 1019 (emphasis in original). *See also MC Assocs. v. Town of Cape Elizabeth*, 773 A.2d 439,443 (Me. 2001) ("A property owner fails to prove a categorical federal or state takings claim if he or she fails to show that the governmental action has rendered the property substantially useless and stripped it of all practical value."); *Q.C. Constr. Co. v. Gallo*, 649 F. Supp. 1331, 1336-37 (D. R.I. 1986) ("[I]t is insufficient for plaintiff to show only that the regulation deprives him of the best use of his property or that the regulation has caused a severe decrease in the

value of the property. . . . Rather, plaintiff must show that the regulation interferes so severely with his use of the property as to render the property worthless or useless."). If the taking is temporary, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 313, 321 (1987).

The defendant raises two procedural challenges to the moving plaintiffs' motion for summary judgment on this claim. It contends that Home Builders lacks standing to raise the claim because it has no right, title or interest in land in York, Defendant's Motion at 18, and that Woods may not press the claim because he has failed to apply to the planning board for approval of Phase II of his project which would be required before any building permits could be sought under the Ordinance, *id*. at 15-16. Home Builders responds, in conclusory fashion, that because its position is that excessive delays in obtaining building permits imposed by the Ordinance effect a taking "the fact that [it] do[es] not own land in York is inconsequential to this claim." Plaintiffs' Opposition to York's Motion for Summary Judgment ("Plaintiffs' Opposition") (Docket No. 43) at 23. It also states in a footnote that it "appears in this action in a representative capacity of persons and entities that own and develop land or who are in supporting businesses," *id*. n.7, citing paragraph 103 of the amended complaint and a page of the deposition of Dan Remick. Woods argues in response that his takings claim is ripe because there is no question about how the Ordinance would apply to his property and because application for the necessary local permits would be futile. *Id*. at 27.

I noted in my recommended decision on the defendant's motion to dismiss this action, when the defendant challenged Home Builders' standing, that ownership of property in York is not required under Maine law to confer standing on the association to bring this action. I found that Home Builders had made the necessary factual allegation in the complaint that one or more of its members was

suffering immediate or threatened injury as a result of the enactment of the Ordinance. Recommended Decision on Defendant's Motion to Dismiss (Docket No. 14) at 14. However, more is required at the summary judgment stage. Home Builders has offered no evidence through its statements of material facts that any of its members has actually suffered or will more than likely suffer any particular injury as a result of the enactment or application of the Ordinance. Home Builders has not provided any evidence that any of its members would have sought to build residences in York but for the Ordinance, or that there exists any other factual basis from which it would be reasonable to infer that any of its members have suffered or would suffer from the delays allegedly imposed by the Ordinance that Home Builders asserts are sufficient to invalidate it on this constitutional ground, or that any of its members have lost "supporting business" due to the Ordinance. Indeed, one of its two citations in support of its position on this issue, to a paragraph of the unverified amended complaint, is not of evidentiary quality and accordingly cannot be considered in connection with a motion for summary judgment, and the other citation does not support Home Builders' assertion that some of its members "own and develop land," let alone land in York, Maine. *See generally Tisei v. Town of Ogunquit*, 491 A.2d 564, 567 (Me. 1985) ("To have standing to challenge a municipality's land use regulations, a party must possess sufficient 'title, right or interest' in the land to confer upon him lawful power to use it or to control its use.") The defendant is entitled to summary judgment on any claim raised by Home Builders in Count IV.

Woods' as-applied takings claim is ripe on the basis of futility. "[T]here are circumstances in which a party, on grounds of futility, might bypass a permit process and go directly to court seeking judicial review of a law's constitutionality under the Takings Clause." *Gilbert v. City of Cambridge*, 932 F.2d 51, 60-61 (1st Cir. 1991). Woods has submitted evidence, some of which is disputed by the defendant, that would allow a reasonable factfinder to conclude that, for him, applying for building

permits under the Ordinance is not a "viable option," *id*. at 61, for his planned Phase II development. Woods SMF ¶¶ 2, 4-16, 19-21. That is sufficient to allow Woods to pursue this claim. *See also Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926). Lack of ripeness is the sole ground advanced by the defendant in support of its motion for summary judgment on Woods' takings claim, Defendant's Motion at 15-16, and the motion accordingly must be denied as to Count IV with respect to Woods.

Woods cannot prevail on his facial takings claim, however. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S.Ct. 1465 (2002), the Supreme Court recently held that a 32-month moratorium on development imposed by a regional governmental agency was not a *per se* taking under the Fifth Amendment. *Id*. at 1477-1489. The ordinance at issue here, while imposing a limit on building permits that apparently causes extensive delays, particularly for developers of multi-family residences, is by its own terms not a moratorium; eighty-four permits are to be issued each year. In addition, the Ordinance by its terms will expire three years from the date of enactment unless extended by a vote at a general election or special referendum. While the question whether such an ordinance creates an unconstitutional taking on its face "depends upon the particular circumstances of the case," *id*. at 1478, the Supreme Court's analysis of the more restrictive moratorium in *Tahoe-Sierra* compels the conclusion that the defendant is entitled to summary judgment on the facial Fifth Amendment challenge to the Ordinance raised by all plaintiffs in Count IV of the amended complaint.

Woods contends that the potential application of the Ordinance to his Phase II property constitutes an unconstitutional taking because it deprives his property of all economically viable use and, in the alternative, that the economic impact of the Ordinance on him is so severe that a taking must be found under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Woods Motion at

7-14. The defendant's response attacks only the ripeness of Woods' claim, Defendant's Objection to Plaintiffs Woods and Homebuilders & Remodelers Motion for Partial Summary Judgment on Count IV (Docket No. 42) at 4-10. I have rejected that argument;[5] nonetheless, I must consider the merits of Woods' argument. *See FDIC v. Bandon Assoc.*, 780 F. Supp. 60, 62 (D. Me. 1991).

When a taking is absolute, *i.e.*, when the owner is deprived of any economically viable use of his property, no further inquiry is necessary. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1432 (9th Cir. 1996). "[W]here an owner is denied only some economically viable uses, a taking still may have occurred where government action has a sufficient economic impact and interferes with distinct investment-backed expectations." *Id*. In determining whether the owner has been deprived of any economically viable use, "[t]he standard is not whether the landowner has been denied those uses to which he wants to put his land; it is whether the landowner has been denied all or substantially all economically viable use of his land." *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1072-73 (11th Cir. 1996). Here, there is evidence in the summary judgment record, disputed by Woods, that, if credited, would establish that Woods' property could be used for single-family residences and that building permits for such residences would most likely have been available during the initial term of the Ordinance. Defendant's SMF ¶ 46. Woods argues that such use of the property "would not provide [him] with a sufficient financial return to return a profit in light of his significant investment into the property," Woods Reply Memorandum at 7. However, the fact that Woods could be left without a profit from such use of his land, due to his own decision to make certain improvements to the property in anticipation of a particular use does not and cannot mean that he has

[5] Woods contends in a single sentence that the defendant is "equitably estopped from arguing that planning board approval of Phase II was anything but a certainty." Reply Memorandum in Support of Plaintiff Woods' and Homebuilders' Joint Motion for Summary Judgment on Count IV ("Woods Reply Memorandum") (Docket No. 45) at 4, but the facts on which he bases that argument are very much in dispute, Woods Supplemental SMF ¶ 27, Woods SMF ¶¶ 22-27, Defendant's Responsive SMF ¶¶ 22-27, and therefore, even if the argument had been developed by Woods in this memorandum, the court cannot conclude that estoppel bars this argument (*continued on next page*)

been deprived of all economically viable use of the property. If a property owner could insist on his chosen use of the property at issue as the standard by which possible economically viable use must be measured, the standard would have little or no objective value. Under the circumstances of this case, the *Penn Central* analysis must be applied.

The three factors to be considered under *Penn Central* are the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action. *In re Weinstein*, 164 F.3d 677, 685 (1st Cir. 1999). The evidence proffered by Woods with respect to the first two factors is uniformly disputed by the defendant. Woods SMF ¶¶ 4, 11-12, 21-27, 35-40; Defendant's Responsive SMF ¶¶ 4, 11-12, 21-27, 35-40. The court may not reach a conclusion under *Penn Central* by applying only one of the three factors. Under these circumstances, it is not possible for the court to conclude as a matter of law that Woods is entitled to summary judgment on his as-applied takings claim. His motion should be denied. For the reasons already stated, the defendant's motion for summary judgment against Woods on Count IV should also be denied.

C. The Defendant's Motion for Summary Judgment

1. Count I. Count I of the amended complaint alleges that the Ordinance violates 30-A M.R.S.A. §§ 3001, 4351 and 4352(2). Amended Complaint ¶¶ 76-85. Those statutory provisions deal with a municipality's "home rule" authority. The defendant contends that the Ordinance is not a zoning ordinance and therefore not required to comply with the statutes invoked by the amended complaint; that, in the alternative, the Ordinance complies with the cited statutes; and that it has applied the Ordinance in accordance with its terms.[6] Defendant's Motion at 4-8. The plaintiffs respond that the

by the defendant as a matter of law.

[6] This argument addresses paragraph 80 of the amended complaint, which alleges that the defendant "is violating Maine's Home Rule provisions, 30-A M.R.S.A. § 3001 *et seq*., to the extent that it is applying the Ordinance in a manner contrary to the Ordinance's (*continued on next page*)

Ordinance constitutes an amendment to the defendant's existing zoning ordinance, that it is so similar in effect to the zoning ordinance that it should be considered part of the zoning ordinance, and that it is inconsistent with the defendant's comprehensive plan. Plaintiffs' Opposition at 1-10.

The statutes cited in the amended complaint provide, in relevant part:

> Any municipality, by the adoption, amendment or repeal of ordinances or bylaws, may exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution of Maine, general law or charter.
>
> **1. Liberal construction.** This section, being necessary for the welfare of the municipalities and their inhabitants, shall be liberally construed to effect its purposes.
>
> **2. Presumption of authority.** There is a rebuttable presumption that any ordinance enacted under this section is a valid exercise of a municipality's home rule authority.

30-A M.R.S.A. § 3001.

> This subchapter provides express limitations on municipal home rule authority.

30-A M.R.S.A. § 4351.

> A municipal zoning ordinance may provide for any form of zoning consistent with this chapter, subject to the following provisions.
>
> * * *
>
> **2. Relation to comprehensive plan**. A zoning ordinance must be pursuant to and consistent with a comprehensive plan adopted by the municipal legislative body.

30-A M.R.S.A. § 4352(2). A zoning ordinance is defined as "a type of land use ordinance that divides a municipality into districts and that prescribes and reasonably applies different regulations in each district." 30-A M.R.S.A. § 4301(15-A).

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express terms and requirements," and paragraph 84, which alleges that the Ordinance violates these statutes "because, *inter alia*, the Town's application is unauthorized by the plain terms of the Ordinance and the Town is therefore acting unlawfully." In their opposition to the defendant's motion for summary judgment, the plaintiffs state that they "do no oppose that part of York's Motion for Summary Judgment arguing that the Ordinance is being applied in a manner consistent with its express terms." Plaintiffs' Opposition at 1 n.1. There is no evidence in the summary judgment record to support a conclusion that the defendant has applied the Ordinance in a manner (*continued on next page*)

The Ordinance, included in the summary judgment record as Exhibit 3 to the deposition of Mark Green, is not a zoning ordinance under the statutory definition. It does not purport to divide the Town of York into districts or to prescribe and apply different regulations in each such district. To the contrary, by its terms it applies throughout the Town. The plaintiffs attempt to overcome this gap in the legal underpinning of their claim by contending that "[t]he Ordinance amends the Zoning Ordinance by effectively barring multi-family housing from those districts where was [sic] previously permitted," and that "the Ordinance effectively prohibits construction of affordable single-family residences — residences that were wholly permissible under the Zoning Ordinance." Plaintiffs' Opposition at 2. Assuming *arguendo* that these contentions are correct, a particularly suspect assumption in the case of "affordable" single-family residences, the *effect* of application of the Ordinance does not transform it into a zoning ordinance. While a municipality should not be able to invalidate its own zoning ordinance by adopting another ordinance designed to circumvent the zoning ordinance, the remedy for an individual harmed by such a state of affairs, if he can establish that such a course of action was in fact pursued by the municipality, lies in the type of constitutional relief sought elsewhere in their amended complaint by the plaintiffs. Maine's home rule statutes simply do not provide the relief sought in Count I. An ordinance, afforded the presumption of authority provided by section 3001(2), must be construed liberally in concert with its expressed terms. The Ordinance cannot reasonably be construed as a zoning ordinance or an amendment to the defendant's existing zoning ordinance. Accordingly, it cannot be invalidated for failure to comply with section 4352(2). *See generally City of Lewiston v. Grant*, 120 Me. 194, 200 (1921) ("Courts are cautious, however, in applying the rules relative to the authority of the municipal corporation to act and discretionary

inconsistent with its terms and the defendant is accordingly entitled to summary judgment on this aspect of Count I.

powers, except in extraordinary cases to restrain gross abuses, are not subject to judicial control.") The defendant is entitled to summary judgment on Count I.

2. Count III. Count III of the amended complaint alleges that the Ordinance denies plaintiffs Woods, Home Builders and Currier Builders, Inc. ("Currier") equal protection of the laws in violation of the Maine and federal constitutions. Amended Complaint ¶¶ 94-101. Noting that these plaintiffs do not contend that any suspect classification or fundamental right is involved in this case, the defendant contends that the Ordinance does not treat these plaintiffs differently from other similarly-situated individuals and that it bears a rational relationship to a legitimate governmental interest. Defendant's Motion at 8-14. The plaintiffs named in Count III respond that their claim is that "all builders of affordable housing have been effectively barred from York by operation of the Ordinance, whereas builders of high-end housing have not been," and that "builders of multi-family housing have been treated less favorably under the Ordinance than builders of single-family residences." Plaintiffs' Opposition at 11, 12. They also contend that a heightened level of judicial scrutiny is required due to the Ordinance's alleged discriminatory effect on "affordable housing and, in turn, low and moderate income individuals." *Id*. at 15-17. In reply, the defendant argues, *inter alia*, that these plaintiffs have not provided evidence to support their allegations concerning "affordable" housing. Defendant's Reply to Plaintiffs' Opposition to Defendant's Motion for Summary Judgment ("Defendant's Reply") (Docket No. 47) at 4.

For equal protection claims, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (citations omitted). Under Maine law, "if the ordinance on its face is reasonable, the objecting party

must produce evidence to show that it is, in fact, unreasonable in its operation. The ultimate test of reasonableness is whether the regulatory means adopted by a municipality bears any rational relationship to the evil to be corrected." *Buck v. Kilgore*, 298 A.2d 107, 109-10 (Me. 1972).

The First Circuit has noted its "extreme reluctance to entertain equal protection challenges to local planning decisions." *Macone v. Town of Wakefield*, 277 F.3d 1, 10 (1st Cir. 2002). When, as is the case here, neither a fundamental right nor a suspect classification is involved in an equal protection challenge,

> courts will uphold legislation that provides for differential treatment upon a mere showing of a rational relationship between the disparate treatment and a legitimate government objective. In making such an inquiry, any plausible justification will suffice, and effectively ends the analysis. In fact, the party challenging the legislation bears the burden of negating every conceivable basis which might support it.

Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 145 (1st Cir. 2001) (citations and internal punctuation omitted). The First Circuit also requires a showing of invidious discrimination, gross abuse of power or fundamentally unfair procedures in connection with such claims. *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 44 (1st Cir. 1992). It has also suggested that a showing of bad faith or malicious intent in addition to evidence of differential treatment may suffice. *Yerardi's Moody St. Rest. & Lounge, Inc. v. Board of Selectmen of Town of Randolph*, 932 F.2d 89, 94 (1st Cir. 1991).

When viewed against these standards, the plaintiffs' case has several problems. They have offered no evidence of bad faith, malicious intent, invidious discrimination or gross abuse of power on the part of the defendant in connection with the Ordinance. The plaintiffs cannot reasonably be said to have made an effort to negate every conceivable basis which might support the Ordinance.

The plaintiffs offer no citations to authority supporting their contention that a heightened degree of judicial scrutiny is required in this case because the Ordinance limits their ability to build "affordable" housing, a term which they do not define and which is not present in the Ordinance.

> The degree to which legislation is scrutinized for a denial of equal protection depends on the nature of the classification made in the statute. "Strict" scrutiny is only appropriate when the statute involves the inherently suspect classifications of race, national origin, or alienage, or it impinges on a fundamental personal right. The Supreme Court has identified only two classifications that warrant heightened scrutiny: gender and legitimacy. Economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose.

Maine Central R. R. Co. v. Brotherhood of Maint. of Way Employees, 813 F.2d 484, 488 (1st Cir. 1987) (citations and internal punctuation omitted). In the unlikely event that these plaintiffs have standing to assert the interest of "low and moderate income individuals" in the construction of "affordable" housing in York, their claims need not be scrutinized at any level beyond that of the rational relationship test.

Another difficulty facing the plaintiffs is their failure to offer any evidence that potential builders of "high-end housing" are treated differently from potential builders of "affordable" single-family housing under the Ordinance. The Ordinance makes no such distinction on its face, nor can such a conclusion reasonably be inferred from its terms. Indeed, if the plaintiffs mean to suggest that single-family residences located in subdivisions would automatically be more "affordable" than those located outside subdivisions, the Ordinance makes two permits per month available for houses to be built in subdivisions and only one for houses built elsewhere, a more favorable treatment of subdivisions. The record contains evidence that the wait for a permit in the non-subdivision category, presumably since the Ordinance took effect, is "nearly two years." Plaintiffs' SMF ¶ 112; Defendant's

Reply SMF ¶ 112. No evidence has been offered concerning the wait for a permit in the subdivision category.

The plaintiffs have submitted evidence that in the ten years before the Ordinance was enacted, Currier built between sixty and seventy residences that cost between $125,000 and $150,000, the majority of which were built in York. Plaintiffs' SMF ¶ 113. This is apparently the plaintiffs' definition of "affordable" housing. The plaintiffs have presented disputed evidence that Currier has not built any such residences since the Ordinance was enacted because it "cannot afford to buy a lot in York and sit on it for almost two years until it gets a permit" and that Woods planned to build a 20-unit subsidized multi-family complex for the elderly as part of Phase II of his development of his property. *Id*. ¶¶ 114, 115, 125. Finally, they offer evidence that "in each of the two years preceding the Ordinance's enactment, affordable single family residences . . . were being built in York" and that since the enactment "not one 'affordable' residence has been built." *Id*. ¶ 116. There is no evidence to suggest that plaintiff Cape Neddick Estates, Inc. ("Neddick") engages or seeks to engage in the construction of "affordable" housing. The plaintiffs have presented no evidence concerning the construction of "high-end" residences in York during any of these periods. If the plaintiffs mean to classify all builders of single-family residences in York other than themselves as the "high-end" builders who are treated more favorably under the Ordinance, their proffered evidence falls far short of supporting such a classification. On the record presented, the plaintiffs cannot demonstrate any differential treatment under the Ordinance due to their claimed status as builders of "affordable" single-family residences.

With respect to the plaintiffs' alternate claim, that the Ordinance discriminates against builders of multi-family housing in favor of builders of single-family residences, the plaintiffs offer no evidence that any plaintiff other than Woods is a builder of such residences or intends or desires to

build such residences in York. Accordingly, as this is the only remaining basis for the equal protection claim asserted by the plaintiffs, the defendant is entitled to summary judgment on Count III against all plaintiffs other than Woods.

Assuming *arguendo* that Woods has presented sufficient information to allow a factfinder to conclude that he and potential builders of single-family residences in York are "similarly situated," a dubious proposition given the nature of Woods' asserted plans for the development of his property as a site to provide a "continuum level of care" for the elderly, he has not submitted sufficient evidence to "negat[e] every conceivable basis which might support" the Ordinance under the rational relationship test. For example, limits on multi-family housing units which do not exclude such units entirely[7] appear to be rationally related to the Ordinance's stated purpose of "[p]rovid[ing] for a predictable residential growth rate and . . . enabl[ing] the town to plan for and expand facilities and services." Ordinance ¶ A.1.1. This is a legitimate municipal objective. *Tisei*, 491 A.2d at 569.

The defendant is entitled to summary judgment on Count III.

3. Count IV with respect to Currier and Neddick. The defendant contends that Currier may not present a takings claim because it has not applied for a permit under the Ordinance. Defendant's Motion at 16-17. It argues that Neddick cannot establish that it has been deprived of all economically beneficial use of its land. *Id*. at 17. The plaintiffs respond that Currier's claim is that it has been deprived of "its entire business in York," rather than any claim based on ownership of "physical land." Plaintiffs' Opposition at 28. They assert that Neddick may recover because delays imposed by the Ordinance make it impossible for Neddick "presently" to recoup its investment in the land on which it has established a subdivision. *Id*. at 29.

[7] Under the Ordinance, a three-unit multi-family dwelling might not be subject to extensive delay in receiving the necessary building permits. A 100-unit multi-family dwelling, like that planned by Woods, would experience delay beyond the three-year term of the Ordinance.

Currier has built or is building homes in the towns of Kittery, Eliot, Ogunquit, Wells, Kennebunk, South Berwick and Action as well as York. Defendant's SMF ¶¶ 14-15; Plaintiffs' Responsive SMF ¶¶ 14-15. It does not suggest that it can only build houses in York or that sufficient land to provide it with a profitable business is no longer available in other towns in which it has built houses in the past or is currently building houses. None of the three cases cited by the plaintiffs in support of their position that an interest in conducting a particular business in a particular municipality is a property interest protected by the Fifth Amendment. In *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-96 (1962), the issue was whether the "entire mining utility" of real property owned by the plaintiff who intended to continue to excavate the property had been confiscated by a municipal mining ordinance. In *Lucas*, the question was whether an owner of real property had been deprived of all economically beneficial uses of that property by a state statute barring the erection of permanent structures on certain property, including that owned by the plaintiff. 505 U.S. at 1006-07, 1019. In *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998), the property at issue was a pension fund owned by the plaintiff employers. None of these opinions can be stretched to provide support for the position advocated here by the plaintiffs. Potential business in a particular municipality, when for all that appears similar business can be maintained elsewhere without significant hardship, simply does not constitute a property interest protected by the federal and Maine constitutions. Based on the showing made, the defendant is entitled to summary judgment against Currier on Count IV.

The evidence in the summary judgment record establishes that (i) Neddick owns 31 acres of property in York; (ii) it applied for approval of an eight-lot subdivision on this land before the enactment of the Ordinance and received approval after enactment of the Ordinance; (iii) it has applied for as many building permits as are allowed for this property under the Ordinance; (iv) it has received one or two building permits; (v) it has sold one of the lots for $225,000 and the buyer has

applied for a building permit; (vi) the remaining lots in the subdivision have a sale price of $225,000 each; and (vii) it has invested between $600,000 and $765,000 in the subdivision. Defendant's SMF ¶¶ 24-29, Plaintiffs' Responsive SMF ¶¶ 24-29; Plaintiffs' SMF ¶¶ 136-37, Defendant's Reply SMF ¶¶ 136-37. These facts simply do not support, or even allow, a conclusion that Neddick has lost all economically beneficial use of the property, even temporarily, as a result of the Ordinance. Since the Ordinance has been applicable to the property, Neddick has sold one of the eight lots and received permits to build on one or two more. The plaintiffs offer no evidence that suggests that Neddick would have had more sales were it not for the Ordinance or even that Neddick is using the building permits it has obtained to build on the property. The evidence in the summary judgment record may reasonably be interpreted to show that Neddick has not received the economic benefit from its property that it anticipated or hoped for, but it is also indisputable that it has not been deprived of the opportunity to derive economic benefit from that property during the term of the Ordinance. Nor can it be said that the evidence establishes such a degree of interference with Neddick's investment-backed expectations or such an economic impact on Neddick that *Penn Central* may apply to allow Neddick to proceed with a takings claim. The defendant is entitled to summary judgment against Neddick on Count IV.

IV. Conclusion

For the foregoing reasons, I recommend that the motion of plaintiffs Walter Woods and Home Builders Association, Inc. for summary judgment be **DENIED**; and that the motion of the defendant for summary judgment be **GRANTED** as to Counts I and III and as to all claims of plaintiffs Currier Builders, Inc., Cape Neddick Estates, Inc. and Home Builders Association, Inc. asserted in Count IV and the facial takings claim of plaintiff Woods asserted in Count IV, and otherwise **DENIED**.

Remaining for trial if the court adopts my recommendations will be the as-applied takings claim of plaintiff Woods set forth in Count IV of the amended complaint.

The defendant's motion to strike is **GRANTED** in part and **DENIED** in part, as set forth above.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 30th day of May, 2002.

_____

David M. Cohen
United States Magistrate Judge

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